No. 83-196

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Appellant,

v.

MONSANTO COMPANY

On Appeal From The United States District Court For The Eastern District Of Missouri

MOTION TO AFFIRM

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THE QUESTION PRESENTED

Whether the disclosure and private use provisions of the 1978 amendments to the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C §§ 136a(c)(1)(D), the last sentence of 136a(c)(2)(A), 136h(b), and 136h(d) (1982)) violate the Fifth Amendment to the Constitution by taking private intellectual property in the form of trade secrets for private use, without just compensation, and without due process of law.

THE PARTIES

Monsanto Company's non-wholly owned subsidiaries and affiliates, pursuant to Supreme Court Rule 28.1, are:

ACM Services, Inc.
Collagen Corporation
Soperton Gum Market, Inc.
Advent Eurofund Limited (UK)
Australian Fluorine Chemicals Pty. Limited
Biogen N.V. (Netherlands Antilles)
Companhia Brasileira de Estireno (Brazil)
Companhia Brasileira de Plasticos Monsanto (Brazil)
Daishin Kogyo K.K. (Japan)
Goyana, S.A. Industrias Brasileiras de Materias Plasticas (Brazil)
Hydrocarbon Products Pty. Ltd. (Australia)
Industrias Resistol, S.A. (Mexico)
Korag Company Limited (Republic of Korea)
Korsil Company, Ltd. (Republic of Korea)
Mitsubishi Monsanto Chemical Company (Japan)
Monsanto Chemicals of India Limited
Monsanto (Malaysia) Sendirian Berhad
102957 Canada Limited
Revertex Industries (N.Z.) Ltd.
Revinex Australia Limited.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities-Continued

Table of Authorities-Continued

Constitution, Statutes and Regulations

Table of Authorities-Continued

Miscellaneous

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MOTION TO AFFIRM

Pursuant to Supreme Court Rule 16, Monsanto Company moves that the judgment of the district court be affirmed.

STATEMENT OF THE CASE

This case involves the unconsented disclosure and private use of pesticide trade secrets. Monsanto Company owns trade secrets consisting of information, research and test data regarding the chemistry, metabolism, degradation, toxicology, and residues of Monsanto's commercially valuable pesticides. In view of the fact that pesticides account for more than 90 percent of Monsanto's operating income, protection of these trade secrets is vitally important to Monsanto's commercial success. As a result of drastic revisions in 1978 to the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7

U.S.C. §§ 136 *et seq.*, under which Monsanto's pesticides are approved and registered with the federal government, Monsanto faced the imminent loss of this trade secret property.

Monsanto filed suit challenging the constitutionality of these 1978 FIFRA amendments which required, for the first time in the history of this statute, the disclosure and use of Monsanto's trade secret information, research and test data for the benefit of the company's competitors. *See* 7 U.S.C. §§ 136a(c)(1)(D), 136a(c)(2)(A), 136h(b), and 136h(d) (1982). After a full trial on the merits, the district court entered a judgment finding that these provisions violate the Fifth Amendment and the Taking Clause and enjoining their implementation. J.S. App. 28a-37a.[1] This is a direct appeal from that judgment.

FIFRA's Historic Protection of Trade Secrets. For nearly thirty years before the 1978 amendments, trade secret research submitted under FIFRA was fully protected from unconsented disclosure or use. Under the original FIFRA enacted in 1947, the U.S. Department of Agriculture ("USDA") carefully preserved the confidentiality of trade secrets while evaluating and registering thousands of pesticides. Contrary to EPA's assertion (J.S. at 4 & n.3), expert testimony at trial showed that USDA consistently kept trade secrets confidential and refused to use one company's trade secrets for the benefit of its competitors. J.S. App. 26a-28a. All pesticide producers were required to submit their own research and test data or data from the public literature in order to obtain registrations.

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[1] References to the district court's findings of fact and decision are cited as "J.S. App. 1a-37a." Emphasis is added unless otherwise noted.

Congress reaffirmed FIFRA's historic protection of trade secrets in 1972, two years after the Environmental Protection Agency assumed responsibility for pesticide regulation. *See* Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat. 973 (1972). These 1972 FIFRA amendments expressly prohibited EPA from disclosing trade secret research and data, and prohibited competing producers from obtaining pesticide registrations on the basis of their competitors' trade secrets without the owners' consent. In reaffirming this protection of trade secrets from unconsented disclosure and private use, Congress adopted "the definition of 'trade secret' as incorporated in the RESTATEMENT OF TORTS [§ 757]." S. Rep. No. 92-838 (Part II), 92d Cong., 2d Sess., at 72 (1972). *See, e.g., Chevron Chemical Co.* v. *Costle*, 443 F. Supp. 1024 (N.D. Cal. 1978).

Despite these 1972 amendments, EPA subsequently rejected following the Restatement definition of trade secrets. Trial Exh. 29 (Mem. of Robert V. Zener, EPA General Counsel). During oversight hearings, EPA was severely chastised by Congress for being "bitterly opposed" to the statutory prohibitions regarding the disclosure and use of trade secrets. *Hearings Before the House Committee on Agriculture on FEPCA Implementation*, 93d Cong., 1st Sess. 11-12 (1973) (Rep. Poage, Chmn., House Agriculture Comm.) ("Hearings"). EPA nevertheless began automatically rejecting *all* claims of trade secret protection for private information, research and test data, prompting judicial decisions that compelled EPA to halt this practice and accept Congress' 1972 adoption of the Restatement's definition of trade secrets. *Mobay Chemical Co.* v. *Costle*, 447 F. Supp. 811 (W.D. Mo. 1978). *See also Dow Chemical Co.* v. *Costle*, No.

76-10087 (E.D. Mich. Nov. 16, 1977); *Chevron Chemical Co.* v. *Costle*, 443 F. Supp. 1024 (N.D. Cal. 1978).[2]

The 1978 FIFRA Amendments. Congress again amended FIFRA in 1978, enacting the trade secret disclosure and use provisions found unconstitutional in this case. Federal Pesticide Act of 1978, Pub. L. No. 95-396, §§ 2 and 15, 92 Stat. 819 (1978).[3] Amended sections 10(b) and (d) drastically altered FIFRA by removing the former restraints on EPA's disclosure of trade secret information, research and test data required from pesticide companies, and *directing* that all such data "be available for disclosure to the public." 7 U.S.C. § 136h(d)(1) (1982). The last sentence of amended section 3(c)(2)(A) also *requires* EPA to "make available to the public" all of a manufacturer's submitted research and test data within 30 days after a pesticide is registered. 7 U.S.C. § 136a(c)(2)(A)(1982). While EPA describes the potential beneficiaries of disclosure as "qualifying members of the public" (J.S. at 2), the record developed in this case demonstrates that Monsanto's business competitors can and would receive Monsanto's trade secrets through these provisions. Trial Exh. 14, 47-51; Tr. 218, 250-51. See also Original Deposition of Clausen Ely, Jr.

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[2] Congress also amended FIFRA in 1975. Act of Nov. 28, 1975, Pub. L. No. 94-140, 89 Stat. 751 (1975). These amendments resolved against EPA a similar controversy over EPA's announced view that the 1972 FIFRA trade secret use restrictions applied only to data submitted to EPA after 1972. *See* 38 Fed. Reg. 31862, 31863 (1973).

[3] At the same time, Congress enacted a number of additional provisions, not at issue here, designed to expedite EPA's registration functions in light of EPA's failure to implement various 1972 amendments, as well as provisions permitting "conditional registration" of pesticides and transferring primary enforcement responsibility to the states. Pub. L. No. 95-396, §§ 6 and 26, 92 Stat. 819 (1978).

The 1978 amendments similarly abandoned the 30-year-old requirement that a pesticide manufacturer submit its own research and test information or data from the public literature. Instead, section 3(c)(1)(D) now awards private pesticide firms a nonconsensual "piggyback" or "free ride" on trade secret research generated and previously submitted to EPA by their competitors: new or corroborating test data is no longer required for EPA approval of pesticide applications. 7 U.S.C. § 136a(c)(1)(D) (1982).

As part of these new provisions, the 1978 FIFRA amendments created a limited private compensation/arbitration scheme for trade secrets submitted under FIFRA after 1969. 7 U.S.C. § 136a(c)(1)(D)(ii) (1982). Those competitors who use another's trade secret property for obtaining their own domestic pesticide registrations must in certain instances *offer* compensation to the owner of the trade secrets. *Id.*; 7 U.S.C. § 136h(d) (1982). If the offer is unacceptable, the owner can be compelled to submit to binding arbitration without judicial review. The owner forfeits any compensation by refusing to do so, 7 U.S.C. § 136a(c)(1)(D)(ii) (1982), and competitors who use disclosed trade secrets outside the registration process need not even offer compensation. Frequently, the trade secret owner would receive no compensation whatsoever for its property. J.S. App. 36a.[4]

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[4] Among other limitations on this private compensation scheme, when arbitration is required FIFRA does not specify any "formula or other guidance on the valuation of data for compensation purposes." 45 Fed. Reg. 55394 (1980); J.S. App. 21a, 34a. In addition, no compensation is required for use of data submitted before 1970, for any data fifteen years after submission, or for competitors' private use of the data for purposes other than domestic "free ride" pesticide registrations. 7 U.S.C. § 136a(c)(1)(D)(iii) (1982).

Litigation Arising from EPA's Implementation of the 1978 Amendments. After enactment of these disclosure and use amendments, EPA promulgated regulations *compelling* all companies seeking registration to cite or refer to their competitors' trade secret information, research and test data. 40 C.F.R. § 162.94, 5 (1979). In effect, these mandatory "cite-all" regulations sharply magnified the frequency with which the amended FIFRA provisions would require the private use and disclosure of trade secrets.

The legal challenges prompted by EPA's mandatory "cite-all" approach first invalidated EPA's regulations for failure to comply with the Administrative Procedure Act, without reaching their substantive validity. *Mobay Chemical Co.* v. *Gorsuch*, 682 F.2d 419 (3d Cir.), *cert. denied*, 103 S. Ct. 343 (1982). EPA then re-proposed identical regulations, 47 Fed. Reg. 57635 (1982), but in the meantime the original regulations were invalidated for substantive inconsistency with FIFRA. *National Agricultural Chemicals Association* v. *EPA*, 554 F. Supp. 1209 (D.D.C. 1983). The *NACA* court held that the 1978 amendments *permitted*, but did not compel applicants to use their rivals' data. Companies so choosing could still seek registration based solely on their own data or data in the public domain. *Id.*

EPA did not appeal the *NACA* decision, and the judgment in that case relieved much of the pressure EPA itself had created to disclose and use competitors' trade secret property. In addition to the controversy over EPA's mandatory "cite-all" regulations, courts were considering a number of constitutional challenges regarding

the 1978 trade secret amendments to FIFRA.[5] Meanwhile, this case was proceeding to judgment.

The Proceedings Below. Monsanto filed this suit shortly after enactment of the 1978 amendments, upon discovering that its trade secrets were about to be used to register a competitor's pesticide.[6] In the first decision to consider fully all the issues and following four years of litigation, the district court entered a limited injunction with respect to FIFRA's disclosure and private use amendments, 7 U.S.C. §§ 136a(c)(1)(D), 136h(b) and (d), and the last sentence of 136a(c)(2)(A) (1982). Based on detailed testimony at trial, numerous depositions, ex-

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[5] One district court held aspects of FIFRA's compensation/arbitration mechanism unconstitutional; other courts have decided various challenges without reaching both the "taking" and "just compensation" questions decided in this case. *Compare Union Carbide Agricultural Products Co.* v. *Ruckelshaus*, No. 76 Civ. 2913 (RO) (S.D.N.Y. July 28, 1983) *with Chevron Chemical Co.* v. *Costle*, 641 F.2d 104 (3d Cir.), *cert. denied*, 452 U.S. 961 (1981); *Mobay Chemical Corp.* v. *Costle*, 682 F.2d 419 (3d Cir.), *cert. denied*, 103 S. Ct. 343 (1982); *Petrolite Corp.* v. *EPA*, 519 F. Supp. 966 (D.D.C. 1981).

[6] *See* Trial Exh. 47 and 50. Throughout this litigation, Monsanto has continued to be threatened with the disclosure and use of its trade secrets. Although EPA has been prohibited from disclosing and conferring Monsanto's trade secret data on competitors during this litigation, *see* Justice Blackmun's opinion denying EPA's stay application, App. A *infra*, EPA's lapses still have resulted in several disclosures under the 1978 amendments. Among those, EPA disclosed certain Monsanto test data in response to a request from a private attorney on May 7, 1982 and to *Pesticide and Toxic Chemical News* for a story appearing June 15, 1983. After the first incident, the district court ordered EPA to show cause why its Administrator should not be held in contempt, and on August 31, 1982, EPA consented to an order further restricting EPA's treatment of Monsanto's trade secret data.

hibits and other evidence, the district court held that these FIFRA trade secret provisions resulted in an unconstitutional taking of Monsanto's property for a private use and without just compensation, thus violating the Fifth Amendment.

At the outset, the court found that Monsanto possesses constitutionally protected trade secret property rights in its valuable information, research and test data. J.S. App. 30a-31a. Not only does the property constitute trade secrets under the definition set forth in the Restatement of Torts § 757 and Missouri law, but EPA itself did "not controvert the fact Monsanto enjoys certain property rights in its information, research and test data." *Id.* The court then ruled that the 1978 FIFRA amendments resulted in a "taking" of that property because they "effectively destroyed" Monsanto's trade secret rights, and gave "Monsanto's competitors a free ride at Monsanto's expense." J.S. App. 31a-33a. Finally, the court held that this taking violated the Taking and Due Process Clauses, on the alternative grounds that the 1978 amendments transfer Monsanto's property for the impermissible "private use" of business competitors, and that neither FIFRA's compensation/arbitration scheme nor any other source would provide "just compensation" for the taking of Monsanto's property. J.S. App. 31a-32a, 34a-36a.

The district court's amended judgment operates only to protect trade secret property and in no way affects EPA's ability to make safety determinations. Throughout this litigation, Monsanto has never challenged EPA's requirements under FIFRA for an applicant to submit adequate information to justify registration, nor has Monsanto challenged EPA's use of trade secret research to *disapprove* unsafe or ineffective pesticides. Moreover, recent EPA guidelines, issued in response to the *NACA* decision

and the district court's judgment, *see* page 6 *supra*, confirm that notwithstanding the protection of trade secrets, pesticides can still be registered with the producer's own data, public data, or with consensual use of another's data. 48 Fed. Reg. 32012 (1983) (announcing Pest. Reg. Notice 83-4). In EPA's own words, "the[se] procedures make it possible for an applicant to satisfy [FIFRA's] registration data requirements . . . [while] the Agency will remain free to evaluate all relevant data in its files." Pest. Reg. Notice 83-4 at 1. Thus, EPA's implication that the transfer and destruction of trade secret property is essential to administering a pesticide registration program is contradicted by both EPA's own recent guidelines and the history of FIFRA.

Despite the fact that EPA is continuing to register, deny, cancel, and suspend various pesticides, EPA applied to this Court for a stay pending appeal on July 1, 1983. On July 27, 1983, Circuit Justice Blackmun denied EPA's application in an opinion attached as Appendix A *infra*. This appeal followed.

THE QUESTION PRESENTED WAS CORRECTLY RESOLVED BY THE DISTRICT COURT

This Court has consistently recognized the importance of trade secrets and of the legal protections afforded this property in our federal system. *Aronson* v. *Quick Point Pencil Co.*, 440 U.S. 257 (1979); *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470 (1974). Among those protections under state and federal law, the Fifth Amendment serves as a fundamental constraint on the authority of the government to take and destroy private trade secret property. R. Milgrim, 1 *Trade Secrets* §§ 6.02[10], 6.02A (1982); *St. Michael's Convalescent Hospital* v. *California*, 643 F.2d 1369, 1374 (9th Cir. 1981).

The 1978 amendments to FIFRA's disclosure and private use provisions violate the Fifth Amendment by destroying Monsanto's trade secrets and effectively transferring Monsanto's property rights to its business competitors. In so holding, the district court recognized that these far-reaching FIFRA amendments completely reorder established property rights, with devastating consequences for Monsanto and severe implications for continued innovation in producing safer and more effective pesticides.[7] As demonstrated below, the judgment of the district court should be affirmed.

I. MONSANTO'S TRADE SECRETS ARE CONSTITUTIONALLY PROTECTED PROPERTY.

The decisions of this Court, the law of trade secrets, and the factual record developed here throughout four years of litigation demonstrate that Monsanto possesses a constitutionally protected property interest in its trade secret research. *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (1945); *Mountain States Tel. & Tel. Co.* v. *Dep't Pub. Serv. Reg.*, 634 P.2d 181, 186 (Mont. 1981). Indeed, it is remarkable that EPA at this late date would suggest otherwise. J.S. 16-17. EPA specifically *conceded* in the proceedings below that Monsanto *does* enjoy substantial property rights in its pesticide trade secret information, research and test data. J.S. App. 30a.

The trade secret property in issue here consists of information, research and test data concerning 31 Mon-

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[7] EPA places substantial emphasis on the district court's statement that the taking of Monsanto's property in violation of the Fifth Amendment cannot be considered a valid regulation of commerce. J.S. at 10, 14-15; *see* J.S. App. 33a. Monsanto does not view this as a separate holding that should be central in the determination whether to note probable jurisdiction, and it therefore is not addressed here.

santo products and their appropriate uses. Monsanto has undertaken this confidential research to develop, market, register, and improve its existing pesticide products, both in the United States and abroad. In addition, Monsanto uses these studies to identify potential avenues for further research and to improve its research processes, testing methodology, and chemical synthesis techniques. J.S. App. 21a.

The investment Monsanto must make in developing these trade secrets—which provide the essential basis for the pesticides Monsanto markets—is enormous. At present, Monsanto employs hundreds of chemists, biologists, and other scientists for this purpose, and has spent more than a quarter of a billion dollars since 1960 in developing its pesticides. *See* Tr. 74-75, 103. Only one in every 10,000 compounds synthesized is finally successful, and the research involved consumes an average of fourteen years between selecting a research target and marketing a product. J.S. App. 5a; Tr. 50. Ultimately, Monsanto's success and survival in the pesticide business depends on those few pesticides developed through this expensive winnowing process that become commercially marketable. Tr. 73-74.[8]

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[8] Five of Monsanto's registered pesticides account for nearly all of the company's commercial success: Lasso®, Roundup®, Avadex®, Avadex® BW, and Ramrod®. Tr. 45. Monsanto's annual worldwide pesticide sales exceed $1 billion. Based on these products, sales by Monsanto Agricultural Products Company, one of Monsanto's four operating companies, accounts for more than 90% of Monsanto's operating income. *See* Appendix A to Monsanto's Brief in Opposition to Application for Stay Pending Appeal (July 11, 1983) (Affidavit of Dr. Frank S. Serdy) in *Ruckelshaus* v. *Monsanto Co.*, No. A-1066 (1983).

Monsanto's commercial benefit from this investment in its trade secrets, however, is fundamentally contingent upon maintaining their secrecy and preserving Monsanto's right to exclusive use. *Underwater Storage, Inc.* v. *United States Rubber Co.*, 371 F.2d 950, 954 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 911 (1967); *see generally* R. Milgrim, 1 *Trade Secrets* §§ 2.03, 7.07[1][a] (1982). The "piggyback" use of these trade secrets on behalf of competitors would eliminate Monsanto's hard-earned innovative advantage without the competitors undertaking the enormous commitment of resources required of Monsanto. *See Board of Trade* v. *Christie Grain & Stock Co.*, 198 U.S. 236, 250 (1905) (Holmes, J.). Moreover, if competitors had access to Monsanto's trade secret research, it would reveal to them, as it does to Monsanto, each pesticide's chemistry, metabolism, course of degradation, residues, and interactions among ingredients. Tr. 106-09, 117. From this information, competitors could seek to reconstruct Monsanto's product formulas. Tr. 101-02, 192. Furthermore, Monsanto's competitors would gain their own research leads, improve their own research techniques, secure registrations in foreign nations, and even register their competitive products for additional uses in the United States. J.S. App. 23a.

Monsanto therefore preserves the confidentiality of this trade secret information under lock and key, accessible to employees only on a need-to-know basis. Tr. 111. Security guards are employed around the clock, and Monsanto personnel are required to execute confidentiality agreements respecting the information. Complementing these measures, property and tort laws prohibit the unconsented use or disclosure of Monsanto's trade secrets by those to whom they have been revealed in confidence. *Sandlin* v. *Johnson*, 141 F.2d 660, 661 (8th Cir. 1944)

(Missouri law); *see Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470, 475-77 (1974).

In view of these facts, EPA stipulated at trial that much of the research and test data Monsanto has submitted pursuant to FIFRA "contains or relates to trade secrets as defined by the Restatement of Torts." EPA further stipulated that "Monsanto has certain property rights in its information, research and test data . . . which may be protected by the Fifth Amendment to the Constitution." First Supplemental Stipulation of Facts (Sept. 8, 1980). The district court agreed, resting its holding on the definition of trade secrets set forth in the Restatement of Torts § 757 (1939) and adopted as the law of Missouri.[9] Pursuant to that definition, the court found, Monsanto holds "the right to exclude others," "the right to prevent the unauthorized use" of its data to benefit Monsanto's competitors, and "the right to prohibit disclosure of its data." J.S. App. 31a.[10]

In this Court EPA nevertheless contends that the 1978 FIFRA amendments redefined what is "private property" within the meaning of the Fifth Amendment. EPA acknowledges that while the research remained with Monsanto it constituted trade secrets protected under

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[9] Monsanto has maintained that federal law also establishes a protected property right in Monsanto's trade secret information, research and test data.

[10] EPA is mistaken in suggesting that Monsanto holds these rights for only a limited time under Missouri law. J.S. at 16 n.12. The decision EPA cites, *Carboline Co.* v. *Jarboe*, 454 S.W.2d 540, 552-53 (Mo. 1970), actually adopts the "head-start" rule to determine the relief afforded one whose trade secrets have been misappropriated. The rule does not define the property itself, and it is well recognized that trade secrets under Missouri law and elsewhere last into *perpetuity* if not disclosed or independently reproduced. R. Milgrim, 1 *Trade Secrets* § 1.01[2] (1982).

state law. J.S. at 16. But according to EPA, once Monsanto submitted its data to the Agency, any "continuing right to confidentiality in the data" somehow became "solely a matter of federal law." *Id.* at 17. This argument ignores the principle that the Fifth Amendment is as much a part of "federal law" as is federal legislation. Indeed, EPA's argument would emasculate the Taking Clause since, in EPA's view, the result of any legislation destroying property rights would be considered merely a redefinition of "property" rather than a taking. The Framers intended no such result, and this Court has directly rejected EPA's view, holding that the government "does not have unlimited power to redefine property rights." *Loretto* v. *Teleprompter Manhanttan CATV Corp.*, 102 S. Ct. 3164, 3178 (1982).

For all types of property, an "owner's right to exclude [is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' " *Loretto*, 102 S. Ct. at 3175 (*quoting Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979)). With respect to trade secret property, however, the "right to exclude" is not merely one of the "essential" rights, it is *the* essential right. *See Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. at 484. Unless the owner of the trade secret can maintain its confidentiality, he has no trade secret property. When the government removes this right to exclude, it has not simply adjusted "Monsanto's right in its property" as EPA claims. J.S. at 21. Instead, it has destroyed the property itself.

Thus, Monsanto's submission of trade secrets in order to register its products is by no means consent to the disclosure and use of that data for its competitors, as EPA seems to suggest. J.S. 16. The fact that Monsanto brought this lawsuit demonstrates as much. Analysis of

the issues here is simply not advanced by EPA's conclusory allegations based on the proposition that Monsanto "voluntarily" submitted its data to EPA and therefore "waived" its Fifth Amendment rights. In addition to the fact that EPA, through its own regulations, agrees that the data were not "voluntarily submitted,"[11] it has long been recognized that the "Government cannot make a business dependent upon a permit and make an otherwise unconstitutional requirement a condition to the permit." *Standard Airlines, Inc.* v. *CAB*, 177 F.2d 18, 20 (D.C. Cir. 1949).[12]

EPA's theory, in fact, recognizes under a different name that the 1978 amendments to FIFRA at issue here do transfer and destroy private property rights under state law, as shown below. This theory certainly provides no basis on which to disturb the conclusion that Monsanto's research and test information is protected property.

II. THE 1978 AMENDMENTS TO FIFRA TAKE MONSANTO'S TRADE SECRET PROPERTY.

This Court's Taking Clause decisions also demonstrate that the drastic 1978 changes to FIFRA result in the taking of Monsanto's trade secret property. EPA's argument to the contrary (J.S. at 18) simply disregards this Court's admonition that a taking depends on the nature of the property involved and a statute's effect on fundamental property rights. *E.g.*, *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164-65 (1980). As

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[11] 40 C.F.R. § 2.307(g) (1982) ("no information to which this section applies is voluntarily submitted information").

[12] *Accord*, *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 102 S. Ct. at 3178 n.17 ("a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation").

the district court found, FIFRA's disclosure and private use provisions appropriate not only the essential "strand," but all of Monsanto's rights in its intangible intellectual property. J.S. App. 31a-33a.

Under FIFRA §§ 10(b) and (d), as amended in 1978, EPA must make private trade secret property relating to pesticide chemistry, metabolism, and testing methodology, among other subjects, "available for disclosure to the public." Indeed, the last sentence of amended FIFRA § 3(c)(2)(A) *requires* EPA to disclose to the public a manufacturer's submitted information, research and test data within 30 days after approving any pesticide registration. In addition, under amended FIFRA § 3(c)(1)(D), competing producers can obtain pesticide registrations for their competing products by using—despite the owners' objections—trade secret test data previously submitted by competing companies who invested millions of dollars in developing the data. *See* 7 U.S.C. §§ 136a(c), 136h (1982).

This Court's decisions applying the Taking Clause, particularly with respect to intangible property rights, establish that these FIFRA provisions take Monsanto's trade secret property. The very essence of "property in a trade secret is the power to make use of it to the exclusion of the world." *Hartley Pen Co.* v. *United States District Court*, 287 F.2d 324, 328 (9th Cir. 1961) (*quoting Cincinnati Bell Foundry Co.* v. *Dodds*, 10 Ohio Dec. Reprint 154 (Super. Ct. 1887) (Taft, C.J.)). *See* R. Milgrim, 1 *Trade Secrets* §§ 2.01, 2.05 and 7.07[1][a] (1982). This Court has held in no uncertain terms that "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation." *Kaiser Aetna* v. *United States*, 444 U.S. 164,

179-80 (1979).[13] The provisions of FIFRA at issue would make Monsanto's trade secrets available to "the world," destroying this fundamental trade secret right in violation of the firmly-established Fifth Amendment principles recognized in *Kaiser Aetna*.[14]

Moreover, FIFRA's appropriation of Monsanto's trade secrets to afford a "piggyback" or "free ride" to competing pesticide applicants also constitutes a "taking" under settled doctrine. *See Loretto* v. *Teleprompter Manhattan CATV Corp.*, 102 S. Ct. 3164 (1982) ("taking" found from state transfer of permanent easement from landlords to

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[13] *See* L. Tribe, *American Constitutional Law* § 9-3 at 460 (1978) (clearest instance of "taking" is where government transfers "the legal powers of enjoyment and exclusion that are typically associated with rights of property"). EPA concedes that FIFRA eliminates Monsanto's right to exclude, but suggests this is not a taking, citing *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980). But *PruneYard* simply held that the right to exclude must yield to conflicting First Amendment rights, particularly inasmuch as commercial shopping centers derive no economic value from excluding the public. That case has no bearing here, where no First Amendment rights are at stake and loss of the right to exclude with respect to the trade secrets has enormous commercial significance.

[14] Citing *Corn Products Refining Co.* v. *Eddy*, 249 U.S. 427, 431-32 (1919), EPA argues that a manufacturer has no constitutional right to sell products without giving the consumer "fair" information about what is being sold. J.S. 20. To the extent EPA is suggesting that the government has constitutional authority to regulate product labeling in order to prevent misbranding—which was the issue in *Corn Products*—EPA's argument is correct but irrelevant. On the other hand, if EPA means to suggest that the Fifth Amendment places no restraints on the government's taking of trade secrets, EPA's theory flies in the teeth of the cases discussed in the text. Such a theory would obviously read the Taking Clause out of the Constitution, and render meaningless the Fifth Amendment principles that, as EPA itself acknowledges (J.S. 2, 17-18), govern whether a taking occurred.

cable TV companies). A "taking can occur"—as it would under the FIFRA amendments—"simply when the Government by its action . . . makes it possible for someone else to obtain the use or benefit of another person's property." *Aris Gloves, Inc.* v. *United States*, 420 F.2d 1386, 1391 (Ct. Cl. 1970). Provisions such as the FIFRA amendments in issue here, that take one person's property to give to another, present the most "glaring instance" of a "taking" constrained by the Fifth Amendment. *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55, 79 (1937).

Finally, placing Monsanto's confidential research in the public domain and permitting use for Monsanto's competitors would result in the permanent destruction of Monsanto's trade secret property, for trade secrets once disclosed are forever lost. *E.g.*, *Harrington* v. *National Outdoor Advertising Co.*, 355 Mo. 524, 196 S.W.2d 786, 791 (1946); *see generally* R. Milgrim, 1 *Trade Secrets* §§ 2.03 and 2.05[1] (1982). Trade secret property rights are "not just diminished but obliterated by public disclosure," which is a conclusive "factor pointing toward government disclosures of trade secrets as takings."[15] Indeed, this Court has consistently found that such a destruction of intangible property violates the Taking Clause.[16]

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[15] Connelly, *Secrets and Smokescreens: A Legal and Economic Analysis of Government Disclosures of Business Data*, 1981 Wis. L. Rev. 207, 251. *See also* Note, *Constitutional Limitations on Government Disclosure of Private Trade Secret Information*, 56 Ind. L.J. 347, 364-68 (1981).

[16] *See, e.g.*, *Armstrong* v. *United States*, 364 U.S. 40 (1960) (destruction of all property rights in materialmen's liens); *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555 (1935) (elimination of liens in bankruptcy); *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922) (total destruction of mining rights).

EPA attempts to evaluate whether a "taking" results from these FIFRA provisions solely by resort to inapplicable and, in this context, confusing standards such as "physical invasion" and "extent of the interference," while ignoring the standards that properly apply. J.S. at 17-18. For example, EPA's argument that "there is no 'physical invasion' of Monsanto's property" (J.S. 18) is simply irrelevant when *intangible* intellectual property is in issue, as it is here. This Court, moreover, has explicitly refused to "embrace the proposition that a 'taking' can never occur unless government has transferred physical control." *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 123 n.25 (1978).[17]

Likewise, EPA labels the total destruction of Monsanto's property rights a "limited interference" with Monsanto's intellectual property. J.S. at 19. EPA's blithe assertion that Monsanto itself will not be barred from use of the data it will have unwillingly surrendered to the world ignores the nature of trade secret property. J.S. at 19-20. Furthermore, to accept EPA's argument, one would have to believe that despite the Fifth Amendment, the government could freely convert private homes into public shelters so long as it did not evict the present occupants.[18] EPA's related suggestion that taking Mon-

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[17] In fact, the cases chiefly relied upon by EPA carefully note that there is no "set formula" applicable to all taking situations. Id. at 124; *Andrus* v. *Allard*, 444 U.S. 51, 65 (1979) ("[f]ormulas and factors have been developed in a variety of settings").

[18] EPA's position is squarely inconsistent with this Court's decisions involving intangible property rights. *See, e.g., United States* v. *Security Industrial Bank*, 103 S. Ct. 407, 412 (1982) (survival of physical objects does not alter holding that legal rights of lienholder would be taken); *Armstrong* v. *United States*, 364 U.S. 40, 48 (1960) ("liens were destroyed" though physical objects had not "vanished into thin air").

santo's trade secret property is permissible because it may not immediately bankrupt the corporation, given Monsanto's other "competitive advantages," is similarly untenable. J.S. at 19. The occurrence of an unconstitutional taking can hardly depend on the size, resources and entirely separate skills of the persons deprived of their property, nor can it turn on whether they continue to hold other assets. *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (1945).[19]

For all these reasons, the district court correctly found that FIFRA's permanent destruction of Monsanto's trade secret property rights and conferral of Monsanto's test data on competitors constitutes a "taking" subject to the limitations of the Fifth Amendment.

III. FIFRA'S TAKING OF MONSANTO'S TRADE SECRET PROPERTY VIOLATES THE FIFTH AMENDMENT'S "PRIVATE USE" LIMITATION.

The district court concluded that the taking of Monsanto's trade secret property pursuant to the 1978 FIFRA

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[19] "[T]he Fifth Amendment concerns itself solely with the 'property' . . . and not with other collateral interests"). *Id.* EPA's contention that Monsanto has not suffered a taking because Monsanto's confidential formulas are not also required to be disclosed (J.S. at 2, 9, 20-21), is similarly inapposite. Monsanto's trade secrets in its product formulas are distinct from, though related to, the property in issue here. In any event, the disclosures required by FIFRA would make it easier for competitors to identify Monsanto's product formulas by reverse engineering. *See* page 12 *supra*. Furthermore, EPA cannot realistically contend that the provision of limited compensation under FIFRA's arbitration scheme in certain instances negates the taking otherwise accomplished by the 1978 amendments. EPA itself concedes that this private compensation/arbitration scheme does not provide just compensation, *see* page 24 *infra*. More fundamentally, the payment of compensation confirms—not refutes—that a taking has occurred.

amendments violates the Fifth Amendment's Taking Clause on two independent grounds. First, the 1978 amendments to the disclosure and private use provisions take Monsanto's property to further a "private use," which the Fifth Amendment forbids regardless of the compensation paid. J.S. App. 31a-32a. *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937). Second, Monsanto's trade secret property is taken without "just compensation." J.S. App. 34a-36a.

Both the scheme of the 1978 FIFRA amendments and their legislative history demonstrate that the extraordinary transfer of Monsanto's trade secret property to its business rivals constitutes a forbidden taking for predominantly "private use." Indeed, EPA barely contends otherwise. J.S. 22.[20] The direct effect of the 1978 amendments is to permit Monsanto's competitors to obtain FIFRA registrations by using Monsanto's trade secret property. 7 U.S.C. § 136a (c)(1)(D) (1982); J.S. App. 30a, 32a. Recognizing this effect, Congress enacted a special compensation/arbitration scheme that requires the private companies benefiting from Monsanto's property to pay Monsanto under certain circumstances for their use of its trade secrets. Congress expressly characterized this type of provision as conferring a "free ride" to

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[20] EPA's contention that these provisions serve a sufficient public purpose to be sustained as an exercise of Congress' power under the Commerce Clause, *see* J.S. at 14-15, does not pardon this violation of the Fifth Amendment. It has long been established that the Fifth Amendment is an independent limitation on Congress' substantive authority under the commerce power. *Kaiser Aetna* v. *United States*, 444 U.S. 164, 174 (1979); *United States* v. *Cress*, 243 U.S. 316, 326 (1917).

private competitors on the "substantial testing expense . . . borne by the first applicant."[21]

The private use and disclosure provisions in the 1978 amendments to FIFRA, on their face, thus present an unparallelled violation of the proscription against taking property for a predominantly "private use." This Court has never sanctioned coercing innocent persons to surrender their property to competitors who have not "contributed in money, services, negotiations, skill, forethought or otherwise" to its development. *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55, 78 (1937); *Washington-Summers, Inc.* v. *Charleston*, 430 F. Supp. 1013, 1015 (S.D.W. Va. 1977) ("property cannot be taken . . . for a predominantly private purpose.").[22]

" '[T]he question of what is a public use is a judicial one.' " *TVA* v. *Welch*, 327 U.S. 546, 552 (1946) (*quoting Cincinnati* v. *Vester*, 281 U.S. 439, 446 (1930)). EPA suggested in the district court that despite the predominantly private use resulting from this property transfer, the provisions could be upheld as a means of

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[21] S. Rep. No. 92-8382, (Part II) at 72-73 (1972) (discussing this possibility during consideration of the 1972 amendments). *See also Hearings*, 93d Cong., 1st Sess. at 11-12 (1973). EPA's own public pronouncements outside this litigation have shared this assessment, describing the statutory disclosure and use provisions as conferring an "unconsented free ride" upon Monsanto's competitors. Pest. Reg. Notice 83-4 at p. 8 (1983).

[22] *Accord*, Connelly, *Secrets and Smokescreens: A Legal and Economic Analysis of Government Disclosure of Business Data*, 1981 Wis. L. Rev. 207, 249 ("[A]ny disclosure of a trade secret that smacked of a property transfer from one private party to another would likely be held to contravene the fifth amendment, without regard to any question of compensation"). *See also Missouri Pac. Ry. Co.* v. *Nebraska*, 164 U.S. 403 (1896).

promoting competition. The district court properly rejected this theoretical justification in view of the actual operation of the provisions. As numerous commentators have agreed, the Taking Clause requires judicial consideration of the statute's actual effect, not merely the theoretical purpose EPA suggests the property transfer might serve.[23] Consistent with these principles and the predominantly private use to be made by competitors of Monsanto's trade secrets, the district court correctly found that the 1978 trade secret disclosure and use provisions take private property in violation of the Fifth Amendment.

IV. "JUST COMPENSATION" IS NOT PROVIDED FOR THE TAKING OF MONSANTO'S TRADE SECRET PROPERTY.

Even if the taking of Monsanto's trade secret property were not unconstitutional as a "private use," the 1978 FIFRA amendments contravene the Fifth Amendment's prohibition against taking property "without just compensation." In the district court, EPA maintained that either FIFRA's private compensation/arbitration scheme or the Tucker Act, 28 U.S.C. § 1491 (1976 & Supp. V 1981), would meet the constitutional requirement for providing just compensation. The district court concluded otherwise. The court correctly found on the basis of the factual record and FIFRA's legislative histo-

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[23] Epstein, *Not Deference, But Doctrine: The Eminent Domain Clause*, 1982 Sup. Ct. Rev. 351, 365-69; Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U.L. Rev. 409 (1983); Note, *Eminent Domain: Private Corporations and the Public Use Limitation*, 11 U. Balt. L. Rev. 310 (1982); Meidinger, *The "Public Uses" of Eminent Domain*, 11 Envtl. L. 1, 44-49 (1980). *See also* B. Ackerman, *Private Property and the Constitution* 190 n.5 (1977).

ry that the FIFRA arbitration scheme did not satisfy the Fifth Amendment requirements articulated by this Court and that Congress had withdrawn any supposed Tucker Act remedy. J.S. App. 34a-36a.

EPA now concedes in its jurisdictional statement that FIFRA's private compensation/arbitration scheme cannot constitutionally suffice as a means of "just compensation." J.S. 23-24, 25. In an attempt to recharacterize the district court's decision, however, EPA proposes that this Court hear argument on a different issue—whether FIFRA's arbitration scheme is constitutional apart from its adequacy as a means of providing "just compensation." J.S. 24-26. Yet this separate and distinct constitutional issue was not decided by the district court and need not be considered as a ground for appeal.[24] J.S. App. 34a-35a.

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[24] Monsanto contended and the district court held that the FIFRA private compensation/arbitration scheme fails to satisfy the special constitutional requirements for providing "just compensation" under the Fifth Amendment. This Court has held that the ascertainment of "just compensation" is inherently a judicial inquiry that not even Congress can assume. *See, e.g., United States* v. *New River Collieries Co.*, 262 U.S. 341, 343-44 (1923). The FIFRA arbitration procedure violates this constitutional stricture and due process by delegating the task to a non-Article III decisionmaker, without establishing any standards for compensation, while precluding judicial review. *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 102 S. Ct. 2858 (1982); *Pacemaker Diagnostic Clinic of America, Inc.* v. *Instromedix, Inc.*, 52 U.S.L.W. 2105 (9th Cir. Aug. 5, 1983). *See also Crowell* v. *Benson*, 285 U.S. 22 (1932).

Therefore, the more general and abstract issue addressed by EPA—divorced from the constitutionality of the arbitration scheme as a means of providing just compensation—was not decided by the district court. In the event probable jurisdiction is noted, Monsanto will brief instead the merits of the issue actually decided by the district court regarding the FIFRA private compensation/arbitration scheme.

Similarly, EPA's suggestion that this recharacterized issue may not be "ripe" for judicial review, J.S. 24-25, is irrelevant and inapplicable to the "just compensation" issues that are appropriately raised on this appeal.[25]

The sole "just compensation" issue raised by the jurisdictional statement, therefore, is whether the district court was correct in finding that no compensation whatsoever is available under the Tucker Act for FIFRA's taking of Monsanto's trade secret property. In deciding this issue, the district court closely followed the test articulated by this Court in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126 (1974). Specifically, the court concluded that as part of the 1978 FIFRA amendments, "Congress has 'withdrawn the Tucker Act grant of jurisdiction to the Court of Claims to hear a suit involving the (challenged statute) founded . . . upon the Constitution.' " J.S. App. 35a (*quoting* 419 U.S. at 126).[26]

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[25] *See* note 24 *supra*. This Court firmly established in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 123-125 (1974), that the arbitration issue actually decided by the district court—the availability and adequacy of a mechanism to provide just compensation for a threatened taking—"is ripe for adjudication" in this context. *Id.* at 123.

[26] Monsanto argued in the district court that regardless whether Congress had withdrawn the Tucker Act remedy, the taking required by the 1978 amendments to FIFRA violated the due process requirement that takings be effected in judicial proceedings. J.S. App. 33a-34a. In addition, Monsanto argued that the comprehensive taking required by the amendments rendered the taking constitutionally "unauthorized," thereby rendering the statutory provisions themselves invalid and warranting injunctive relief. *See, e.g., Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555 (1935) (destruction of liens by bankruptcy act enjoined). Should this Court note probable jurisdiction, Monsanto will renew these independent arguments in support of the judgment.

Both the structure of the amended FIFRA and its legislative history amply support the district court's finding that Congress intended FIFRA's own private compensation/arbitration scheme to be the exclusive means of providing "just compensation" for the taking of trade secret property. By requiring the competitors profiting from use of Monsanto's property to offer compensation under this scheme, Congress unmistakably intended that private parties themselves must pay for the taking, not the United States and the public at large.

Similarly, Congress directed that any property owner such as Monsanto who declines to participate in this private compensation/arbitration scheme "shall *forfeit* the right to compensation for the use of the data in support of the application." Section 3(c)(1)(D)(ii), 7 U.S.C. § 136a(c)(1)(D)(ii) (1982). Congress' decision to make the specified procedure exclusive, and avoid judicial involvement under the Tucker Act in providing "just compensation," is further reflected in its withdrawal of judicial review of the private arbitration decisions. *Id.* Indeed, the principal Senate sponsor of the 1978 amendments specifically described this private compensation/arbitration scheme as Congress' intended means of providing "just compensation" for the taking effected by FIFRA. 123 Cong. Rec. S13095 (July 29, 1977) (Sen. Leahy).

EPA's jurisdictional statement reveals little basis for disagreement with the district court's conclusion that any Tucker Act remedy has been withdrawn. Certainly the single fact that Congress had permitted resort to the Tucker Act in the Regional Rail Reorganization Act of 1970 does not demonstrate that Congress followed the same course in the 1978 FIFRA amendments, as EPA seems to imply. J.S. 22-24. Moreover, EPA is mistaken in suggesting that other courts have upheld the availability

of "just compensation" under the Tucker Act for takings by FIFRA.[27]

The district court identified several additional factors indicating that the Tucker Act remedy had been withdrawn or was inadequate, such as the necessity for property owners to file an endless stream of suits and the exposure of the Treasury to multi-million dollar claims by thousands of pesticide producers. J.S. App. 36a. Even if limitations on the form and conditions for relief under the Tucker Act would permit the Court of Claims to grant "just compensation" for the taking of trade secret property in this manner, the magnitude of such an oppressive burden on the Treasury and the Court of Claims confirms that Congress intended to make FIFRA's private compensation/arbitration scheme exclusive.

In sum, FIFRA's taking of Monsanto's trade secret property is "without just compensation" and violates the Fifth Amendment, and the district court correctly so ruled.

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[27] In one of the cases cited by EPA for this proposition, *Union Carbide Agricultural Products Co.* v. *Costle*, 632 F.2d 1014 (2d Cir. 1980), *cert. denied*, 450 U.S. 996 (1981), far from finding that the remedy was available, the court treated the question as being wholly unresolved. 632 F.2d at 1019. Similarly, while the district court in *Chevron Chemical Co.* v. *Costle*, 499 F. Supp. 732, 742-43 (D. Del. 1980), offered the view that Tucker Act relief might be available, the court of appeals reviewing that decision expressly declined to resolve the issue. 641 F.2d 104, 117 (3d Cir.), *cert. denied*, 452 U.S. 961 (1981).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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Dated: September 12, 1983

APPENDIX

Appendix A

IN THE SUPREME COURT OF THE UNITED STATES

No. A-1066

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

v.

MONSANTO COMPANY

ON APPLICATION FOR STAY

[July 27, 1983]

JUSTICE BLACKMUN, Circuit Justice.

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et seq.*, as amended in 1978, 92 Stat. 820, requires pesticide manufacturers to register their products with the Environmental Protection Agency (EPA) prior to marketing them in the United States. The EPA decides whether to register a pesticide; it bases its decision on an evaluation of test data concerning the product's effectiveness and potential dangers. This data typically is submitted by the pesticide's manufacturer. Section 3(c)(1)(D) of FIFRA, 7 U.S.C. § 136a(c)(1)(D) (1976 ed., Supp. V), provides, however, that test data submitted in connection with a particular pesticide may be used by manufacturers seeking registration of similar pesticides. In effect, a subsequent applicant for registration may "piggyback" its registration on the efforts of the initial applicant. The subsequent applicant must offer to compensate the initial applicant, and compensation is to be determined by binding arbitration if the parties cannot agree on a sum. § 3(c)(1)(D), 7 U.S.C. § 136(c)(1)(D) (1976 ed., Supp. V). In addition, health and safety data submitted by the initial applicant may be disclosed to the public pursuant to § 10(d), 7 U.S.C. § 136h(d) (1976 ed., Supp. V).

Respondent Monsanto Company manufactures several registered pesticides. To obtain registration, Monsanto submitted test data developed at a cost claimed to be in excess of $23 million. These test data are trade secrets under the law of Missouri, and Monsanto consequently has the right to prevent their use and disclosure. Monsanto brought suit in the United States District Court for the Eastern District of Missouri, contending that the use or disclosure of its test data pursuant to the FIFRA provisions described above would constitute an unconstitutional taking of its property. The District Court agreed, and enjoined enforcement of these and related provisions of FIFRA. The District Court declined to stay its injunction pending direct appeal to this Court, and the Administrator of the EPA has applied to me for a stay. Having reviewed the application, the response, and the other memoranda and supporting documents filed by the parties and several *amici*, I deny the application.

A Justice of this Court will grant a stay pending appeal only under extraordinary circumstances, *Graves* v. *Barnes*, 405 U.S. 1201, 1203 (1972) (POWELL, J., in chambers), and a district court's conclusion that a stay is unwarranted is entitled to considerable deference. *Id.*, at 1203-1204; *Bateman* v. *Arizona*, 429 U.S. 1302, 1304 (1976) (REHNQUIST, J., in chambers). An applicant for a stay "must meet a heavy burden of showing not only that the judgment of the lower court was erroneous on the merits, but also that the applicant will suffer irreparable injury if the judgment is not stayed pending his appeal." *Whalen* v. *Roe*, 423 U.S. 1313, 1316 (1975) (MARSHALL, J., in chambers); see *Graves* v. *Barnes*, 405 U.S., at 1203. An applicant's likelihood of success on the merits need not be considered, however, if the applicant fails to show irreparable injury from the denial of the stay. *Whalen* v. *Roe*, 423 U.S., at 1317-1318.

In this case, the Administrator has not convinced me that irreparable harm will result if the District Court's injunction remains in effect pending appeal. During this interim period, the injunction prevents the EPA from registering new pesti-

cides through use of previously submitted test data, and members of the public will be unable to obtain test data relating to health and safety. The EPA will remain able, however, to register new pesticides; applicants for registration may submit their own test data to support their applications, and may rely on previously submitted data if the submitters have given permission. The EPA has adopted interim procedures to permit registration in this manner. See 48 Fed. Reg. 32012-32013 (1983). If an applicant for registration chooses to rely on previously submitted data without the submitter's permission, the EPA may process the application although it may not actually register the product pending appeal. While registrations and disclosures will be delayed somewhat, "delay alone is not, on these facts, irreparable injury." *Whalen* v. *Roe*, 423 U.S., at 1317.

Two other considerations enter into my decision to deny this application. First, the granting of a stay might well cause irreparable harm to Monsanto. If the District Court's injunction were lifted, the EPA would be free to use Monsanto's trade secrets for the benefit of its competitors and could disclose them to members of the public. Monsanto's trade secrets would become public knowledge, and could not be made secret again if the judgment below ultimately is affirmed. In addition, the Administrator has not been particularly expeditious in seeking a stay or in pressing his appeal. This application was filed more than 7 weeks after the District Court issued its amended judgment. The Administrator has requested and received a 30-day extension of time in which to file his jurisdictional statement with this Court. While certainly not dispositive, the Administrator's failure to act with greater dispatch tends to blunt his claim of urgency and counsels against the grant of a stay. See *Beame* v. *Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (MARSHALL, J., in chambers).

I shall enter an order accordingly.